ASHER M. NATHAN, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA.

A tax imposed by a State upon all money or exchange brokers is not void for repugnance to the constitutional power of Congress to regulate commerce.

Foreign bills of exchange are instruments of commerce, it is true; but so also are the products of agriculture or manufactures, over which the taxing power of a State extends until they are separated from the general mass of property by becoming exports.

A State has a right to tax its own citizens for the prosecution of any particular business or profession within the State.

Banks deal in bills of exchange, and this court has recognized the power of a State to tax banks, where there is no clause of exemption in their charters.

THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

On the 26th of March, 1842, the State of Louisiana passed an act to increase the revenue of the State, the ninth section of which provided that "each and every money or exchange broker shall hereafter pay an annual tax of $ 250 to the State, in lieu of the tax heretofore imposed on them."

On the 3d of February, 1845, Isaac T. Preston, the Attorney-General of the State, filed a petition in the District Court of the first judicial district, stating that A. M. Nathan was justly indebted to the petitioner in the sum of $ 250, for pursuing or having lately pursued, within the year 1843, the business of a money and exchange broker. The petition then prayed that he might be cited to appear and answer, and be condemned to pay; also that he might answer the following interrogatories under oath, viz.: —

"Were you a broker, as above stated, in 1843?

"Did you or not receive brokerage or commissions?

"State clearly the nature of the same; whether received in money transactions."

The same process was pursued to collect the tax for 1844.

On the 19th of April, 1845, the two suits were consolidated and the defendant answered as follows.

"The defendant for answer denies generally all the allegations in the plaintiff's petition contained. And further answering, he says, that so much of such parts of 'An act to increase the revenue of the State,' under and by virtue of which this suit is brought to recover of this defendant the tax thereby imposed upon the business of a money and exchange broker, and especially the ninth section thereof, particularly referred to in the plaintiff's petition, so far as the said section and act impose a tax on that part of the business of a money and ex-

change broker which consists in buying and selling exchange, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as give to Congress the exclusive power to regulate commerce, and prohibit to the States all interference with the power so granted, and forbid them to impose, without consent of Congress, any duty on imposts or exports.

"And so far as the said section and act impose a tax on that part of the business of a money and exchange broker which consists in buying and selling money or foreign coin, or other currency, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as gives to Congress the exclusive power 'to coin money, regulate the value thereof, and of foreign coin.'

"And so far as said section imposes a tax, not uniform in amount with other State taxes on occupations, respondent avers, that the same is contrary to so much of the treaties, laws, and Constitution of the United States as reserve and guarantee to the inhabitants of Louisiana all the rights, advantages, and immunities of citizens of the United States, particularly that of uniform taxation; and to so much of said Constitution as reserves to the people of the several States all powers not delegated to the States respectively, or to the Union.

"Wherefore he prays, that the plaintiff's demand be dismissed, with costs, and for all other and general relief which his case may require.

(Signed,) RICHARD HENRY WILDE,
Defendant's Attorney.
" A. K. JOSEPHS.
" H. H. STRAWBRIDGE."

A. M. Nathan, defendant, for answer to the interrogatories to him propounded in the above entitled suit, says: —

"I was a money and exchange broker in 1843 and 1844; I received a brokerage or commissions on money and bills of exchange sold by my agency.

"I will state clearly the nature of the same. My business, like that of money and exchange brokers in general, consists exclusively in negotiating and effecting for others the purchase and sale of exchange on other States or foreign countries. During the thirty years that I have been a money and exchange broker, I believe, — nay, I am certain, — that I have never, as such, sold a single bill drawn from one point of Louisiana on another.

"I make myself acquainted with the current market value of exchanges. The purchasers and the sellers both resort to me for information on the state of the market of exchanges, and make me their common agent in the purchase and sale of bills, which are purchased for the purpose of making remittances to foreign parts, and usually so remitted immediately. On and out of the price of each bill, I receive a percentage or commission, varying from one fourth to one eighth of one per cent., which is commonly paid on settlement. It is the same in money transactions.

(Signed,) A. M. NATHAN."

On the 7th of June, 1845, the District Court decreed that the State of Louisiana should recover of the defendant, A. M. Nathan, the sum of five hundred dollars, and costs of suit.

An appeal was had to the Supreme Court of Louisiana, which, on the 15th of December, 1845, affirmed the judgment of the District Court. The defendant sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Wilde* (in a printed argument), for the plaintiff in error, and *Mr. Coxe*, for the defendant.

Mr. Wilde contended, that the law of Louisiana was repugnant to the Constitution of the United States, because it interfered with the exclusive power of Congress to regulate commerce.

Congress has the exclusive power to regulate commerce. The power to regulate implies the power to preserve. An unlimited power to tax is a power to destroy. A State cannot have the power to impair or destroy that which Congress has the power to preserve and regulate: therefore, a State cannot tax the instruments whereby Congress exercises its constitutional powers. 4 Wheat. 428, 432.

Exchange is a necessary instrument of commerce. 4 Wheat. 147; 13 Peters, 531, 548, 563, 606.

The mind cannot conceive the possibility of carrying on commerce, in the present state of the world, without bills of exchange.

A bill drawn in one State, on the citizen of another, is a foreign bill. Buckner *v.* Finley, 2 Peters, 586.

The sole business of plaintiff in error, therefore, is buying and selling foreign exchange. See answer to interrogatories.

There is not a particle of testimony that he deals in domestic exchange, or in money. The court, consequently, in adjudging against him, could only have proceeded, and did, in

fact, proceed, upon the ground that, as a dealer in foreign exchange exclusively, he was subject to the tax; and that the act imposing it was constitutional.

Now, there is no difference between taxing the *article* and taxing the *faculty* to sell it. 4 Wheat. 399; 12 Wheat. 444.

To tax the trade or faculty of selling bills of exchange, then, is the same thing as to tax the bills themselves.

To tax bills of exchange is to tax a necessary instrument of commerce, and taxing that without which commerce cannot be carried on is imposing a tax on commerce itself. It is no answer to say, that the impost is moderate, though in the present case it is, in fact, excessive, because, if the State can tax at all, it may tax indefinitely, and an indefinite power to tax is a power to destroy. 4 Wheat. 428, 432.

Exchange is as necessary an instrument of commerce as ships or vessels.

Could the State of Louisiana levy a tax, in the shape of a license, to every consignee or ship-broker in the city of New Orleans, prohibiting captains of vessels, and all others, from acting as consignees without such license?

Would it avail the State to say, such an imposition is not a tax on commerce, nor a duty on ships and vessels, but only a license on the faculty of acting as consignee on the trade of ship-broker?

All useful regulation does not consist in restraint or taxation. That which Congress, in the exercise of their constitutional power, think proper to leave *free*, is as much regulated by them, as that which they restrain or tax. 9 Wheat. 18. Were it not so, it would not be an exercise of the power to "lay duties," when certain goods are allowed to be imported duty free. Could a State tax the introduction of such goods?

Where there is a repugnancy between the State power to tax, and the Federal power to preserve, regulate, and leave free, the State power must give way. If the State can tax in such a case, Congress is not supreme. 4 Wheat. 429, 432, 433.

A State can have no concurrent power over that in regard to which the power of Congress is exclusive. What sort of concurrent powers would those be which cannot exist together? 9 Wheat. 15.

Congress has no power of revoking State laws, as a distinct and substantive power. It legislates over subjects, and over those subjects which are within its constitutional province its legislation is supreme, and overrules all inconsistent or repugnant State legislation. 9 Wheat. 30.

Its exclusive power to regulate commerce carries with it the power to regulate exchange as an indispensable instrument of commerce, and the power being exclusive, a concurrent power in the State is a contradiction.

"Commerce in its simplest signification means an exchange of goods: but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation." — Mr. Justice Johnson, in Gibbons *v.* Ogden, 9 Wheat. 229, 230.

Thus it has been resolved, that a steamer employed in transporting passengers is as much engaged in commerce, as a sail vessel freighted with merchandise, and as much exempt from State legislation obstructing her traffic. Gibbons *v.* Ogden, 9 Wheat. 215, 219.

Congress have not only the exclusive power to regulate commerce, but to make all laws which shall be necessary for carrying into execution that power.

(*Mr. Wilde* then proceeded to show that exchange was an essential part of commerce, and cited many decisions of this court to prove that a State could not retard, impede, or burden, by any device, the operation of the constitutional laws enacted by Congress.)

Mr. Coxe, for defendant in error.

The power of taxing persons carrying on a particular business has been often exercised, and the constitutional power of the States so to act has heretofore not been questioned. In Pennsylvania, for instance, the venders of foreign merchandise are compelled to take out a license, for which they pay a sum graduated according to the amount of their business. Act of May 4, 1841; Purdon, 1153, 1154. A similar tax is imposed frequently by State legislatures, and even by the corporate authorities of cities, and is supposed to be unexceptionable as to its legality.

The provision of the Louisiana statute, which is now called in question, is to be found in a single section of a general revenue system act.

It does not profess to, nor in fact does it, impose a tax upon a bill of exchange, either in the shape of a stamp duty or otherwise.

It does not profess to, nor in fact does it, impose any restraint upon a party having funds in Louisiana, which he desires to remit abroad, from purchasing a bill of exchange as the instrument of remittance.

It does not profess to, nor in fact does it, impose any restraint upon a party having funds abroad, which he desires to bring into the State, from drawing a bill of exchange or selling it at his own discretion.

These operations are left wholly unaffected by this law. The section of the law which is objected to acts only upon the persons employed in conducting a particular business, — the trafficking in exchange. They are not the drawers of bills of exchange, — as such, they are not taxed; as buyers, they are not taxed; but as dealing in them, purchasing and selling, they are. It is as their business consists in buying bills drawn by others, on which they make a profit, — as sellers of bills to others, who require them, on which they make a profit, — that they become subject to the law.

That money and exchange brokers are a convenient machine in conducting an extensive commercial business may be true. But they are nothing more. A ship or a steamboat is not only a convenient, but an essential, means of importing foreign merchandise from abroad. Are they the less property, and taxable as such?

Stages and other carriages are not less essentially necessary instruments for the transportation of passengers and commodities between the different States of the Union. Are they therefore exempted from taxation by the States?

Stores and warehouses, in which merchandise is deposited on its arrival in our country from abroad, are absolutely necessary for the transaction of commercial business. Are they therefore beyond the reach of the taxing power of the State in which this kind of property is found?

Mr. Hamilton (Federalist, No. 32) says: — "I am willing to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants; and, making this concession, I affirm that (with the single exception of duties on imports and exports) they would, under the plan of the Constitution, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the general government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause in the Constitution."

In this case, the law of Louisiana is not obnoxious to any of the objections which have been heretofore presented to the consideration of the court, growing out of the difficulty of giving a precise definition of the words "imports and exports,"

and "commerce," or in drawing the almost shadowy lines which mark the boundaries of the exclusive powers of Congress. A bill of exchange is in no sense either an export or import. It is an instrument, rather than a subject of commerce. The dealing in bills of exchange constitutes no part of the commerce with foreign nations or between the States, however convenient an instrument it may be found in conducting either. The article in which the plaintiff in error deals is a bill of exchange, originating, it may be, within the limits of the State, created and owned by a citizen of the State, and the entire negotiation of which, so far as he is concerned, conducted within the limits of the State.

If this law is objectionable because it affects bills of exchange on the ground that they are the subjects of commerce, upon what principle, it may be asked, can the validity of those State laws be vindicated which regulate the protest of such instruments, or prescribe damages for their dishonor? These are commercial regulations, affecting the interests of all parties to these instruments.

Stress seems to be laid, in the argument submitted on behalf of the plaintiff in error, on the circumstance that the business of his client was exclusively confined to buying and selling bills of exchange drawn on foreign countries or upon other States. He refers to 4 Wheaton, 147, in which a learned counsel in his argument says, that the most important medium of foreign commerce is foreign bills of exchange, which are, therefore, important subjects of commercial regulation. The same gentleman, however, adds, that Congress having neglected the duty of legislating on the subject, "the States may and do exercise it, and their rightful use of this power has been sanctioned by this court in innumerable instances." If there was any argument in the first citation bearing upon the case at bar, the additional remark makes the authority a strong one in favor of the judgment under review. Indeed, it may be asserted as a general, if not a universal proposition, that the law on the subject of bills of exchange, whether domestic or foreign, is regulated not by Congress, but is dependent on the local law of the several States, which have adopted, with such modifications as were thought expedient, the general principles of the commercial law of Europe.

Mr. Justice McLEAN delivered the opinion of the court.

This suit is brought before us, by a writ of error to the Supreme Court of Louisiana.

By an act of the Legislature of Louisiana, of the 26th of

March, 1842, entitled "An act relative to the revenue of the State," it is provided in the ninth section, that "each and every money or exchange broker shall hereafter pay an annual tax of $ 250 to the State, in lieu of the tax heretofore imposed on them." The defendant below having failed to pay the tax for two years, a suit was brought against him in the District Court of the State, in which a judgment for five hundred dollars was rendered. That judgment, on an appeal to the Supreme Court of the State, was affirmed. The defence made was, that the sole business of the defendant was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the constitutional power of Congress "to regulate commerce with foreign nations and among the several States."

This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

The right of a State to tax its own citizens for the prosecution of any particular business or profession, within the State, has not been doubted. And we find that in every State money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practise the learned professions, and every description of property, not exempted by law, are taxed.

As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from State taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship-building, the same as the exercise of any other mechanical art? and also the traffic of ship-chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his

business, within the State, on the ground that the products sold may be used in commerce.

No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on.

In the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Peters, 257, this court held that a State has power to incorporate a bank; and this power has been exercised by every State in the Union, except where it has been prohibited by its constitution. And the banks established, it is believed, have been, without exception, authorized to deal in foreign bills of exchange. And this court held in Providence Bank *v.* Billings and Pitman, 4 Peters, 514, that a State had power to tax a bank, there being no clause in the charter exempting it from taxation. In the case of The Bank of Augusta *v.* Earle, 13 Peters, 519, it was decided that the bank established in Georgia, having a right in its charter to deal in bills of exchange, could, through its agent and the comity of Alabama, buy and sell bills in that State.

If a tax on the business of an exchange broker, who buys

and sells foreign bills of exchange, be repugnant to the commercial power of the Union, all taxes on banks which deal in bills of exchange, by a State, must be equally repugnant.

The Constitution declares that no State shall impair the obligations of a contract, and there is no other limitation on State power in regard to contracts. In determining on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages, under the law of the State where the indorsement was made. Every indorsement on a bill is a new contract, governed by the local law. Story's Conflict of Laws, 314.

For the purposes of revenue, the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the Federal government can no more regulate the commerce of a State, than a State can regulate the commerce of the Federal government; and domestic bills or promissory notes are as necessary to the commerce of a State, as foreign bills to the commerce of the Union. And if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State.

The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituents.

If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form

of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty.

We think the law of Louisiana imposing the tax in question is not repugnant to any power of the Federal government, and consequently the judgment of the Supreme Court of the State is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* MCKEAN BUCHANAN.

Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished.

A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known, and certain.

There are two books for the government of the officers of the navy, usually known as the "Blue Book" and the "Red Book." The "Red Book," although later in date, did not repeal the "Blue Book," except in some few specified particulars.

The duty of paying mechanics and laborers at the navy-yards was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed to a purser for performing this service.

The question, whether or not these acts were parts of the official duty of pursers, was one of law, to be decided by the court, and not of fact, to be left to the jury.

Losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond.

The statute of March 3, 1797, which allows set-offs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off.

It appears, also, that the government is not responsible for a wrong committed by one officer upon another. The party injured has other modes of redress than setting off the damages as a defence, when sued upon his bond by the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsyl-